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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,
Petitioners,

v.

HARZA ENGINEERING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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Pursuant to the Court's Rule 15.7, petitioners hereby submit this supplemental brief in response to the brief of the United States as *amicus curiae*, filed June 12, 1990, in response to the Court's invitation.

If the brief of the United States proves anything, it is that the act-of-state doctrine has been thrown into considerable confusion by the decision in this case and that lower courts need this Court's guidance.

I. THE UNITED STATES HAS NOT EXPRESSED ANY FOREIGN-RELATIONS CONCERNS ABOUT THIS CASE BEING HEARD.

Nowhere does the brief of the United States identify any manner in which the foreign relations of the United

States would be injured by adjudicating this private debt action. In fact, as noted below, the Department of State has yet to express any foreign-relations concern about this case being heard. Yet that is the only reason a court would be justified, under the act-of-state doctrine, in declining to hear a case on the merits. *W.S. Kirkpatrick & Co., Inc.* v. *Environmental Tectonics Corp., Int'l*, 110 S. Ct. 701 (1990).

"Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them," *id.* at 707. Before a court decides not to consider a case on the merits because of the act-of-state doctrine, the "purposes" of the doctrine should, as the United States has emphasized (Br. 11), receive great weight. But those purposes are, as is agreed on all sides, to effectuate comity among nations and to respect the separation of powers—under which relations with foreign states are the responsibility of the Executive Branch. Integrating these two principles leads, we believe, to the conclusion that a lower court should not conclude that foreign relations will be injured without *something* to support that result, *cf. Kirkpatrick*, 847 F.2d at 1067.

We suggested that seeking the views of the Executive Branch should be an essential element of that determination whenever the case involves confiscation of intangible property.[1] The brief of the United States agrees

[1] The brief of the United States is in error when it says (p. 18) that it was "only after oral argument" that we asked the court of appeals to seek the views of the Executive Branch on whether any foreign-policy concerns would be raised by hearing the case on the merits. In fact, our first request was made on April 7, 1989, (*see* App. to Br. in Opp.), whereas oral argument occurred on May 17, 1989 (*see* Pet. App. 1a). The second request, in the form of a petition for rehearing, was submitted on August 30, 1989 (Br. in Opp. 9). Of course it was only then that the court of appeals had shown that it believed itself competent to make a foreign-policy determination as the basis for its decision.

with us (Br. 18-19), assuming we are correct in our assertion that the court of appeals bottomed its decision on its finding that adjudicating this case would injure this nation's relationship with Iran. The brief asserts (p. 19) that we have misread the statement in the opinion of the court of appeals that to deny recognition to Iran's confiscation of petitioners' claim would be "a slap in the face of the Iranian regime" (Pet. App. 10a). We do not know what else to make of that statement and the repeated—not isolated—use of the word "slap" in the succeeding lines in the opinion. The brief of the United States suggests that this was simply an "illustration" of the concerns that underlie the doctrine, noting that this Court similarly took account of such concerns in *Banco Naçional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428-36 (1964). The Court's discussion there, however, centered on the concept of territoriality and the virtual certainty that the foreign government would be offended if a court in the United States refused to recognize a confiscation of tangible property that had in fact been completed within the borders of the confiscating state. Where the property is intangible, as it is here, it has been known since Judge Friendly's 1965 decision in *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), that courts in the United States do not recognize such confiscations when, there as here, the foreign government could not compel the American debtor to pay the debt. The Department of State has never, to our knowledge, asserted that hearing claims in this distinct line of decisions involving intangibles would cause foreign-relations difficulties.

If, then, we are right in our interpretation of the court of appeals decision, it follows that the decision was in error. Nowhere in the record of this case are the views of the Executive Branch found on the critical question: Would it injure the foreign relations of the United States to adjudicate this case on the merits?

Certainly those views are not contained in the brief of the United States in this Court.[2] Indeed, the brief completely ignores the clearest evidence that adjudication of this case on the merits would not adversely affect relations with the Iranian government—that government's utter disinterest in the roughly $2 million claim the lower courts have ruled that Iran owns (Pet. App. 9a, 28a). The likely result—which even the court of appeals acknowledged (Pet. App. 11a)—is a windfall for respondent with no corresponding benefit to the foreign relations of the United States.

To leave the lower court decision standing would therefore leave other courts to wonder how they are to go about deciding whether the "purposes of the act of state doctrine" call for dismissal of a case that is otherwise properly before them for adjudication.

II. WHERE THE DEBT WAS OWED BY AN AMERICAN COMPANY, THE SECOND AND FIFTH CIRCUIT DECISIONS HAVE NEVER TURNED ON WHETHER THE EVENTS THAT GAVE RISE TO THE DEBT HAD HAD ANY CONNECTION TO THE UNITED STATES.

We also agree with the United States that "concepts of territoriality" (Br. 14) have played and should play

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[2] It is the Department of State which has responsibility for determining foreign relations concerns related to cases in courts in the United States, and it is generally that Department which supplies the views of the Executive Branch to the courts on that kind of question, either through the Solicitor General or even directly in the lower courts, *see, e.g., Kirkpatrick*, 110 S. Ct. at 703-04. Unlike the brief of the United States as amicus curiae in *Kirkpatrick*, however, the brief of the United States in this case gives no evidence that it was subscribed to by the Department of State or that there is any foreign relations reason for not hearing this claim. Thus, it may not be correct to say that, because the Solicitor General has been invited to file a brief, any error of the lower courts in not inviting the Executive Branch to express its views *on whether the foreign relations of the United States would be injured by adjudication of this case* has been "cured" (p. 18).

an important role in determining when the act-of-state doctrine should cause a court to decline to adjudicate a case. *See, e.g., Kirkpatrick*:

> "In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign *performed within its own territory*."

110 S. Ct. at 704 (emphasis added). This has led the Second and Fifth Circuits to develop a set of workable principles (not a "rigid, debtor-oriented rule" (Br. 14)) for deciding when the doctrine should apply in cases where a debt owed by an American is confiscated: When the debtor is not under the dominion of the confiscating state, residence of the debtor in the United States is a sufficient basis not to apply the doctrine (Pet. 8-10).

The United States elaborately discusses the prior decisions of those Circuits but finds significance in facts to which the decisions' authors attached no significance. In none of the cases did the decision turn on whether the events that gave rise to the debt had had any connection to the United States.

The genesis is *Republic of Iraq, supra*. It involved two kinds of intangible property: a deposit in a New York bank and shares of a *Canadian* investment trust. 353 F.2d at 49. There is no indication anywhere in Judge Friendly's opinion that either the deposit or the shares had any connection with the United States, nor did he attach any significance to whether there had been any such prior connection.[3] He found the sole dispositive fact to be that "only a court in the United States"—and not an Iraqi court—"could compel the bank to pay the balance in the account or to deliver the certificates it

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[3] A bank deposit, of course, is nothing but a debt. *See* Vladikavkazky v. New York Trust Co., 189 N.E. 456, 459 (1934).

held in custody." *Id.* at 51. For this reason, and no other, the court held that the confiscation need not be given effect.

In the other cases, although the statement of the facts sets forth some prior connection to the United States, not a single opinion gives the slightest hint that such a connection had any bearing on the decision. Instead, the cases *uniformly* state that the dispositive issue was the same one that underlay *Republic of Iraq*—whether the confiscating state could fully carry out the confiscation within its own borders (Pet. 9-10). This has always turned on whether the American debtor had property in the confiscating state or could for some other reason be sued there.[4]

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[4] We strongly disagree with the United States when it says (pp. 12-13) that these courts might now be following a different rule, citing Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985), and Allied Bank Int'l v. Banco Credito Agricola, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985). In the first place, the Fifth Circuit in *Callejo* explicitly stated that the case before it, which involved a foreign state's confiscation of a debt owed *by one of its nationals*, presented different act-of-state considerations from those that apply when the debt is owed by an American, although it went on to note that applying the analysis developed in those cases would not have led to a different result in the case before it. 764 F.2d at 1123-24. The same is true for the Second Circuit in *Allied*, and in addition, the Second Circuit's *Bandes* decision, which came down three years after *Allied* (and which involved a debt owed by an American), did not even cite *Allied* and gave no hint that the court was departing in any way from its longstanding mode of analysis in such cases. Bandes v. Harlow & Jones, Inc., 852 F.2d 661 (2d Cir. 1988).

Likewise, this Court's decision in Dames & Moore v. Regan, 453 U.S. 654 (1981), involved claims against a foreign state, not against American debtors. In any event the Court was at pains to emphasize that, owing to the unusual need for a rapid decision, the case should not be taken to have decided any more than what was actually at issue, 453 U.S. at 660-61, 688, and the act-of-state doctrine was not at issue there.

It was thus surprising to read the court's conclusion in *Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333 (9th Cir. 1985), that Iran, the confiscating state, could fully carry out the confiscation in Iran because of Iran's connection with the Iranian creditor and the work that gave rise to the debt:

> "Tchacosh was incorporated under the laws of Iran. The subcontract in issue was to be performed wholly within Iran. Iran retains any work completed. Payment was to be invoiced and made to Rockwell's office in Teheran. Disputes arising under the subcontract were to be resolved under Iranian law."

766 F.2d at 1338. The court never explained how these facts support the conclusion that the confiscation could be carried out in Iran. Nor does the lower court in this case or the brief of the United States supply that explanation. In fact, Iran cannot carry its confiscation to its logical conclusion except by seeking a remedy in the courts of the United States.

The United States, although professing to favor "workable rules and principles" that lower courts have developed (p. 10), proceeds to recommend the exact opposite—an amorphous "interest analysis" drawn from an area of law ("modern conflict-of-laws principles") that addresses an entirely different set of concerns.

Whatever the intellectual appeal of an "interests analysis," such an approach certainly provides very little assistance to lower courts (and to those who read decisions in an effort to guide clients).[5] For example, one

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[5] The authors cited by the United States (Br. 13) have themselves been critical of this mode of analysis insofar as it seeks to determine the relative interests of two or more states (in the United States). For example, they say:

> "Since the rules being interpreted seldom included any answer to the conflicts problem . . . the interpretative process reduced itself to a freewheeling analysis of governmental purposes and functions . . . . Subjective reactions were inevitable. Govern-

of the key facts the *Tchacosh* court took into account was that the parties there had agreed that Iranian law should apply. 766 F.2d at 1338. Here the parties agreed that Illinois law should apply, but the United States brushes this fact off as insignificant (Br. 15 n.8), and does so without explaining how courts are supposed to weigh the various allegedly relevant facts in making their determination.

In any event, such an approach would not respect "the underlying purposes of the act of state doctrine," as the United States claims (p. 14). If the object of the "interest analysis" is to assist in determining when adjudication of a case will give offense to a foreign sovereign, that would involve the courts in making the very foreign policy judgments that the act-of-state doctrine is meant to avoid. Moreover, the evident purpose of the analysis, as witness its application in this case and in *Tchacosh*, is to expand the application of the act-of-state doctrine, which means that more foreign confiscations will be given effect by courts in the United States, more litigants will be deprived of access to those courts, and more American debtors will enjoy the benefit of not paying debts they owe. How such results are consistent with the act-of-state doctrine is nowhere explained.

In short, there is plainly a conflict in approach here. Had this case come up in the Second Circuit or the Fifth Circuit, the analysis would have been different and the result would have been exactly the opposite from what transpired in the court below.

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mental interest could, in the hard cases, be discovered by one analyst and denied by another."

R. Leflar, L. McDougal & R. Felix, *American Conflicts Law* § 91, at 267 (1986). Indeed, the kind of weighing process that this analysis can involve is, say the authors, "essentially political in character, a job for legislatures and not for courts." *Id.* at 268 (citing Professor Brainerd Currie).

CONCLUSION

The Court should grant the petition for certiorari in order to resolve the conflict among the circuits and to explain how courts are to resolve act-of-state claims involving confiscations of debts owed by Americans.

Respectfully submitted,

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